

**Submission
No 74**

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Australian Lawyers Alliance

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**Submission to the Standing Committee on
Law and Justice**

**First review of the workers' compensation
scheme (2016)**

10 October 2016



EXECUTIVE SUMMARY OF THE ALA SUBMISSION

1. The recommendations of the Standing Committee on Law and Justice Review of the functions of WorkCover, Report 54 of 2014 should be adopted and accepted in full.
2. The functions of regulator and nominal insurer should be more clearly defined.
3. The Parkes Project should be funded to finality.
4. Ambiguities, uncertainties and conflicts within the legislation should be resolved.
5. The dispute resolution processes should be simplified and rationalised in a single forum for dispute resolution that features the core values of "equality before the law, fairness, impartiality, independence, respect for the law, accessibility, competence, integrity, accountability and efficiency".
6. The restrictions and constraints that are currently imposed on settlement options for statutory compensation benefit claims should be removed.
7. All parties to a dispute should have reasonable avenues available to them by which claims can be resolved including, if necessary on a final basis, by the provision of flexible settlement options including commutations.
8. Barriers which impede a workers access to available benefits should be removed or resolved.
9. Benefits should be enhanced to workers to take up the significant excess in funds in the nominal insurer (the surplus)
10. All parties to disputes involving statutory compensation benefits have access to properly remunerated legal representation.



ABOUT THE ALA

The Australian Lawyers Alliance (ALA) is a national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

We oppose oppression and discrimination and support democratic accountable systems of Government and an independent judiciary.

We value immensely the right of the individual to personal autonomy in their lives and to equal treatment under the law.

The ALA is well placed to provide commentary to the Committee. Members of the ALA regularly advise clients all over the country that have sustained injury or disability in their workplace and by other means. Our members advise clients of their rights under current state based and federal schemes, including, workers compensation schemes motor accident legislation and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort. We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models.

INTRODUCTION

The ALA welcomes the opportunity to provide a submission to the NSW Legislative Council Standing Committee on Law and Justice in response to their First Review of the workers compensation scheme.

The ALA's NSW members are some of the most engaged in the workers compensation scheme. Our stated objective is to ensure a fair, sustainable and affordable workers compensation scheme that delivers fair outcomes and benefits for workers, focussing on genuine return to work and restoration of health without perversion by the arbitrary and capricious decisions of insurers. We desire a single dispute resolution system and a single Act to bring consistency, harmony and fairness to the system.

The ALA believes that the NSW workers compensation scheme is in crisis: mercifully not because the scheme is in devastating deficit but because the scheme is in obscene levels of surplus yet benefits remain low and, for the most part, *inaccessible* to the majority of workers. This is despite a broad package of 'benefit reforms' delivered by Government in September 2015.

The scheme is in dire need of a considered overhaul to ensure that the system delivers on its objectives and is sustainable for the foreseeable future.

SUBMISSION

Terms of Reference

In providing this submission the ALA has considered the open Terms of Reference to this Inquiry and the Committee's Media Release dated 15 August 2016.

The Chair of the Committee announced on 15 August 2016 *"This is the committee's first review of the scheme since the 2015 changes. The committee is eager to hear from stakeholders about the affordability, efficiency and sustainability of the scheme since we **last looked at it in 2012**, and is interested to hear about any impacts from the recent structural changes."*

The ALA notes that in fact the scheme was 'last looked at' in **2014** with the Standing Committee on Law and Justice's "Review of the Exercise of the functions of the WorkCover Authority". That review was the first review of the scheme since the 2012 reforms. The ALA commends the Committee on the resultant report (no 54) wherein 26 recommendations were made focussed on scheme performance, access to benefits, guidelines, conflicts of interest and the role of the WorkCover Independent Review Officer (now the Workers Compensation Independent Review Officer or WIRO).

2014 Review Report No 54

The Australian Lawyers Alliance (ALA) continues to support all 26 of the unanimous and bipartisan recommendations of the former Standing Committee in relation to the NSW workers compensation scheme.

The Government response to the report was tabled by the Minister for Finance, Services and Property, the Honourable Dominic Perrottet, in May 2015 by which time

the Standing Committee had been disbanded with the advent of a new period of Government.

The response referred to a number of major developments in relation to workers compensation in New South Wales since the Committee's report:

- an announcement by the CEO of Safety, Return to Work and Support, Mr Vivek Bhatia of the operational separation of the regulatory and commercial functions within the workers compensation division,
- the transitional regulation of June 2014 introducing access to hearing aids, prostheses, home and vehicle modifications and related treatment until retiring age for "existing claims" and extended medical benefits for workers with a WPI of between 21 and 30% until retiring age

These announcements effectively adopted recommendations 1 and 6 (and subsumed recommendations 2, 3, and 5) made by the Committee in its Report no 54.

Minister Perrottet reported that in addition to these developments, *WorkCover* would initiate a number of actions during 2015 to address the Committee's other recommendations, including:

- reviewing incentives and penalties for non-compliance with return to work provisions (recommendation 11)
- supporting the recently formed return to work inspectorate to assist with compliance of return to work provisions in the 1998 Act (recommendation 11)
- developing a long-term overarching education and awareness campaign to inform employees and employers of the rights and obligations in regard to returning to work following an injury (recommendation 12)
- developing and publishing an engagement plan in consultation with all stakeholders (recommendation 13)
- establishing a disability industry reference group (recommendation 15)
- provision of detailed information in *WorkCover's* annual reports including information on claims processes etc. (recommendation 16)
- recommending the publication of statistical bulletins (recommendation 17)
- reviewing workers compensation guidelines in consultation with stakeholders (recommendation 20)
- publishing the external auditors final report on the decision-making process for prosecutions (recommendation 21)
- undertaking a review of self-insurer regulatory requirements (recommendation 24)
- developing an actuarial and legal impact statement of an expanded Comcare scheme (recommendation 25)

The ALA was buoyed by the Minister's commitment to fulfilling the recommendations. However, it is now in excess of 12 months since the Minister committed *WorkCover* (now *SIRA*) to a series of activities and yet there has been very little by way of resolution of these actions.

The 2015 reform legislation and structural changes

The ALA appreciates that a number of the recommendations are now superfluous by virtue of the structural changes effected under the *State Insurance and Care Governance Act 2015* (SIGC Act) which commenced on 1 September 2015.

Broadly speaking, that Act effected the following the structural changes:

- Repeal of the *Safety Return to Work and Support Board Act 2012* and abolition of the Safety Return to Work Board;
- Creation of a regulator of statutory insurance schemes (a government agency called State Insurance Regulatory Authority of NSW known as SIRA).
- Creation of a single insurance and care service provider (Insurance & Care NSW known as “icare”)
- Creation of an independent workplace health and safety regulator (SafeWork NSW);
- Creation of new prudential standards
- Abolition of the WorkCover Authority of New South Wales and the Motor Accidents Authority of New South Wales.

Who is regulating the scheme - The functions and objectives of SIRA v icare

SIRA now has the following principal *objectives* (as regards workers compensation) set out in section 23 of the SICG Act.

SIRA's *functions* as workers compensation regulator are set out in sections 22 and 23 of the *Workers Compensation and Workplace Injury Management Act 1998* (the 1998 Act). Those functions are supplemented by specific functions set out in section 24 of the SICG Act.

icare's *functions* are to:

- to act for the Nominal Insurer in accordance with section 154C of the Workers Compensation Act 1987,
- to provide services (including staff and facilities) for any relevant authority, or for any other person or body, in relation to any insurance or compensation scheme administered or provided by the relevant authority or that other person or body,
- to enter into agreements or arrangements with any person or body for the purposes of providing services of any kind or for the purposes of exercising the functions of the Nominal Insurer,
- to monitor the performance of the insurance or compensation schemes in respect of which it provides services,
- such other functions as are conferred or imposed on it by or under this or any other Act.

It appears to the ALA that there remains a tension in relation to monitoring and performance of the workers compensation scheme in that both the regulator and the nominal insurer are charged with the same function.

In fact, the icare website proclaimed in late 2015:

“The NSW workers compensation scheme (Nominal Insurer) is the single largest workers compensation insurer in NSW. Five scheme agents are currently contracted to manage claims for injured workers and provides policies to employers on its behalf. Around 272,000 employers and over 3 million workers are covered by the scheme.

A workers compensation scheme under icare will make it easier for people to receive their benefits, be treated as quickly as possible, track their claims progress and return to work. It will be the agent of change to simplify the workers compensation scheme. It will roll out a range of online and other tools, including mobile apps, to make the customer’s journey simpler and more transparent.

Under icare, the workers compensation scheme will be less adversarial, there will be fewer forms and less bureaucracy, and injured workers will have much more say in their treatment and return to work pathway.

icare will continue to develop fair, transparent and predictable insurance pricing for businesses across NSW that recognise the individual efforts of each business in maintaining a safe work environment.”

The statement gives rise to the question: just who is regulating the scheme?

EMERGING ISSUES WITH THE WORKERS COMPENSATION SCHEME/SYSTEM

The ALA has had the benefit of reading and contributing to the submission of the Law Society of New South Wales and adopts and supports the submission in full.

Ambiguity, Uncertainty and Conflicts

The Parkes Project

In December 2014 the Workers Compensation Review Officer(WIRO), Kim Garling initiated an inquiry named 'the Parkes Project' under his powers of inquiry in section 27(c) of the *Workers Compensation and Workplace Injury Management Act 1998*. The Inquiry's Terms of Reference were to:

- consider the amalgamation of the Workers Compensation Acts
- address ambiguity in the Workers Compensation Acts and the Regulation
- resolve conflicts in the legislation to align the Acts with current Government policy
- reduce the complexity of the legislation
- identify potential enhancements to the legislative framework to benefit all stakeholders

The ALA was invited together with many other stakeholders to be represented on an Advisory Committee and a Working Group.

The Advisory Committee discussed twelve key issues identified for consideration over the course of early 2015 and came to unanimous agreement as to a Statement of Principles. The issues identified by the inquiry are now the recurring themes of discussion amongst stakeholders from all quarters including the ALA.

The ALA supports and endorses the outcomes of the Parkes Project but notes that the project did not receive sufficient funding to complete the anticipated work.

The ALA recommends the WIRO be afforded funding to complete the Parkes Project which will result in recommendations to resolve key issues regarding the workers compensation scheme and legislation which will be made to the Minister.

We attach the adopted **Statement of Principles** and draft recommendations last discussed by the Advisory Committee on 24 July 2015.

Dispute Resolution

Current system

Since the 2012 amendments the dispute resolution system for workers compensation scheme has been in disarray and is now borders on dysfunctional.

The bifurcated (or trifurcated) 'system' is confusing, difficult to navigate and contradictory. The best demonstration of how convoluted the system is an examination of the 'Sabanayagam' case: *Sabanayagam v St George Bank Limited* [2016] NSWCA 145. In that matter the worker was self-represented in an internal review and merit review of a work capacity decision and represented by a lawyer in an application for resolution of a dispute before the Workers Compensation Commission. The processes ran almost concurrently and the Commission proceedings resulted in an appeal to the Supreme Court where the worker was successful, only after the Court of Appeal considered that there was no such thing as a 'notional work capacity decision', that is a work capacity decision that must have been made at some time to form the basis of a dispute but which had never been communicated or documented to the worker.

Prior to resolution of that matter there was a period of time where an absurd anomalous situation occurred as workers who sought merit review were informed that the decision for which they were seeking review was not a work capacity decision and that they had to pursue resolution of the dispute before the Workers Compensation Commission¹. At the same time, the Workers Compensation Commission refused to accept lodgement of applications for resolution of a dispute where they considered the disputed notice was a work capacity decision. Workers were left with no place to go.

Uncertainty

There remains considerable uncertainty around what constitutes a dispute notice that takes you down one path (internal review, merit review and WIRO review) and a dispute notice that takes you directly to the Workers Compensation Commission. iCare

¹ See, for example, decision WCD7216 reported at <http://wiro.nsw.gov.au/sites/default/files/WIRO%20BULLETIN%20No.%201-FINAL-2August2016.pdf>

attempted to resolve the uncertainty with instructions to scheme agents², whereas WIRO has extended funding to disputes arising from section 74 notices with certain characteristics in the nature of a work capacity decision³.

Given that workers have to navigate the work capacity decision review process without the assistance of lawyers and given that the system is sufficiently complex that even lawyers "get it wrong", it is bewildering that there appears to be no appetite to address the dispute resolution system with any urgency.

Single forum for dispute resolution

The ALA has had the opportunity to read the draft submission of the Law Society of New South Wales and adopts and supports the submission in relation to addressing the dispute resolution processes.

The ALA supports the Parkes Project Discussion Paper on dispute resolution and the Statement of Principles and draft recommendations of the Advisory Committee to the Parkes Project in relation to dispute resolution.

The ALA maintains and repeats its call for a single forum for dispute resolution of workers compensation matters. That forum should have the features of independence, appointed judicial officers, full time legally qualified workers compensation (personal injury) expert decision makers, the right of all parties to maintain legal representation, the power to make costs orders and an avenue of appeal to a superior court.

Legal practitioners appearing before the tribunal should be able to be remunerated appropriately and in accordance with commercial rates with annual indexing of the legal costs scale.

The ALA supports the adoption of the Council of Australasian Tribunals' "*International Framework for Tribunal Excellence*"⁴ which supports core tribunal values of "equality before the law, fairness, impartiality, independence, respect for the law, accessibility, competence, integrity, accountability and efficiency".

Facility

The ALA submits that there is a lack of 'facility' in the current scheme. There is no easy way in, around, or out of the scheme. Examples of lack of facility are:

Inability to commute, redeem or 'settle'

There is an absence in the current scheme of a working system or mechanism by which a worker can exit the scheme securing his or her entitlements for the future or resolving a dispute with finality by way of 'settlement'. It is the ALA's opinion that workers and insurers should be able to avail themselves of a mechanism by which they

² See icare workers insurance; Section 74 Notices and Work Capacity decisions instructions, attached.

³ WIRO Policy update WIRO WIRE 28 July 2016
<http://e.wiro.nsw.gov.au/link/id/zzzz57999700afdca442Pzzzz555a8fcad0421380/page.html?extra=>

⁴ <http://www.coat.gov.au/images/downloads/INTL%20COAT%20FRAMEWK%20TRIB%20April%202014.pdf>

may resolve a dispute or ongoing 'liability' for benefits under the scheme which brings finality to the claim.

The continuing and overwhelming frustration of the current dispute resolution system is that there are extremely limited means by which a dispute may be finalised once and for all as between the parties.

The only mechanisms available to workers in the scheme are to enter into a commutation arrangement under section 87EA of the *Workers Compensation Act 1987* (the 1987 Act) or pursue a work injury damages claim. Both have a threshold of 15%WPI.

The ALA is strongly of the view that the prerequisites in section 87EA are overly onerous and inaccessible to most workers.

Schedule 8 of the 2012 Amending Act sought to provide a means whereby 'the Authority'⁵ could 'open' commutations in certain terms. Schedule 8 remains unproclaimed. The ALA submits that proclaiming Schedule 8 would not remedy the absence of a proper finalisation mechanism.

The ALA believes that section 87EA should be repealed in full to facilitate resolution of disputes and claims on terms agreeable to both parties on a full and final basis. Any settlement of rights or liabilities should permit workers to avail themselves of paid legal representation and advice and there should be an appropriate approval process presided over by a judicial officer in the event that a worker is operating under a disability.

Inability to negotiate between impairment percentages

There remains the inability to negotiate an impairment value for an injury as between insurer and worker. The ALA notes recommendation 8 of report 54 from the former Committee's inquiry in 2014 which was formulated after the discussion undertaken in chapter 4 (paragraphs 4.80 to 4.93 of the report).

The ALA shares the concerns previously voiced by the WIRO "*regarding the inability of injured workers and insurers to negotiate a mutually agreed resolution in instances where disagreements over an assessment of permanent impairment arise*". This concern has not been ameliorated and the ALA repeats its call for restoration of the ability to negotiate impairment as between the parties.

Inability to aggregate impairments from separate injurious events and separate body parts

The ALA is concerned about the inability to *aggregate* WPI when a worker has sustained separate measures of whole person impairment as a consequence of a series of unrelated injuries, unrelated events or injury to unrelated body parts. This is concerning because the inability to aggregate those measures of whole person

⁵ Part 2, Division 1, clause 3 of Schedule 4 of the *State Insurance and Care Governance Act 2015* provides for the abolition of the WorkCover Authority and assignment of the rights, liabilities and functions of the WorkCover Authority to either icare, SIRA or Safework NSW based on the extent to which those assets, rights and liabilities relate to the nominal insurer, or regulator under various Acts.

impairment can prevent a worker accessing benefits that are only provided to workers with high needs (greater than 20% WPI) or workers with highest needs (greater than 30% WPI).

The argument against aggregation is based on construction and interpretation of section 32A and the definition of 'worker with highest needs' (formerly seriously injured worker) and is set out by President Judge Keating in *Merchant v Shoalhaven City Council* [2015] NSWCCPD 13.

The ALA is of the view that there is nothing conceptually different between a worker with five injuries or injured body parts which are combined to value 31% and a worker who has had one injured body part with an impairment of 31%. The premise upon which whole person impairment is evaluated is to assign a value to an impairment of functionality of a body part based on the whole person. To not permit aggregation of impairment evaluations for a single person who has a number of distinct injuries is to treat the worker as a number and not a whole person.

As an extreme example of the absurdity, the ALA can imagine a worker who has his left thumb amputated as a result of injury and in a separate incident his right thumb amputated (22%WPI per thumb) to be prevented from being treated as a worker with highest needs and being deprived weekly benefits until retirement despite severe disability and the aggregated combined value of his impairment being 39% WPI. To continue to assess the worker on the basis of one injury without consideration of the other will lead to anomalous decisions being made in respect of his work capacity, benefit entitlement and return to work options.

The ALA seeks a recommendation that the legislation be amended to permit aggregation of impairments arising from separate and distinct injurious events and separate and distinct injuries for the purpose of meeting threshold requirements in respect of weekly benefits, domestic assistance and medical expenses compensation.

Accessibility of benefits

The current benefits arrangements within the workers compensation system in New South Wales provide for weekly payments of compensation, medical and treatment expenses (including artificial aids, home and vehicle modifications and prostheses), domestic assistance payments, a permanent impairment lump sum and modified common law payments (work injury damages).

Accessing benefits is made difficult by a series of provisions in both the 1987 Act and the 1998 Act and by the adoption of impairment evaluation as the access mechanism to various categories of benefits.

Section 66(1A) of the 1987 Act

Naturally, an impairment evaluation has to be conducted in order to access a permanent impairment lump sum. However, the 2012 amendments have now been clarified by the New South Wales Court of Appeal⁶ and by a subsequent regulation⁷

⁶ *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250

such that an injured worker may only make one claim for permanent impairment lump sum compensation (by which we mean may only receive one payment for permanent impairment lump sum compensation) after 19 June 2012. This is by virtue of the interpretation of section 66(1A) of the 1987 Act.

The single, once and only permanent impairment lump sum compensation payment prohibits workers who suffer a significant deterioration of their condition as a consequence of perhaps the effluxion of time or surgery to be properly compensated for their impairment. The ALA seeks a recommendation in accordance with the draft recommendation of the Parkes Project that workers be permitted to seek additional permanent impairment lump sum compensation if they can demonstrate significant deterioration of their condition.

Section 322A of the 1998 Act

In a vast number of cases, permanent impairment will be determined by an Approved Medical Specialist (AMS) on referral to medical assessment under section 65 of the 1987 Act and section 322 of the 1998 Act.

At the conclusion of an assessment under Section 322 of the 1998 Act, a medical assessment certificate will issue which certifies as to the AMS's assessment of the matters referred for assessment including impairment evaluation if so asked.

But level of impairment determines not only permanent impairment lump sum compensation but the duration of weekly payments compensation, whether a worker is a worker with high needs or highest needs, the duration of medical and treatment expenses, access to artificial aids and domestic and vehicle modifications for life, and is the gateway threshold to work injury damages.

Section 322A of the 1998 Act was introduced as part of the 2012 legislative reform. At the time it was clear that the section was primarily intended to supplement and fortify the one claim provision set out in section 66(1A). Section 322A permits only one *assessment* of the degree of permanent impairment of an injured worker. In addition, it permits only one *medical assessment certificate* in connection with that assessment. The medical assessment certificate is that which results from an assessment under Part 7 of the 1988 Act which is an assessment conducted by a medical assessor appointed by the Workers Compensation Commission.

Section 322A now acts as a complete barrier to assessments to determine threshold issues concerning access to weekly benefits, whether a worker is a worker with high needs or with highest needs, access to domestic care payments, access to medical treatment expenses in including artificial aids and prostheses and access to work injury damages.

The ALA argues that s 322A is a superfluous and unnecessary section and should be repealed from the 1998 Act as soon as possible to permit workers to access the level of benefits to which they are legitimately entitled.

⁷ *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015* (NSW)

Impairment and section 59A of the 1987 Act

Section 59A was introduced in 2012 and acted to prevent a worker from receiving payment of medical and treatment expenses unless the treatment was *given or provided* within 12 months of weekly compensation ceasing. There has been almost unceasing attention to the interpretation of section 59A by the Workers Compensation Commission since 2013. Most notable are the decisions of *Vella*⁸ and *Collett*⁹ in which competing interpretations of section 59A are aired. The ALA called for amendment of section 59A as did the Advisory Committee to the Parkes Project.

The 2015 amending Act amended section 59A by extending the duration of medical and treatment expenses. In addition, duration is now determined by level of whole person impairment. This has created additional unintended consequences not envisaged when section 322A was introduced into the Act.

Section 59A requires a worker to assert their level of whole person impairment in order to determine whether they get up to 2 years, 5 years or lifetime medical and treatment expenses following the cessation of weekly benefits. Workers with high needs (greater than 20% WPI) will receive lifetime access but they will have to assert their one shot at impairment evaluation before the expiry of two years in order to extend beyond the two-year limit.

A worker must first establish their impairment in order to know whether they are entitled to ongoing medical expenses compensation for greater than two years. The reliance on impairment evaluation to determine access to medical treatment is, in the ALA's opinion, putting the cart before the horse.

Given the definition of maximum medical improvement now contained in the 4th Edition of the NSW Workers Compensation Guidelines for the evaluation of permanent impairment:

1.15 Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement.

This is considered to occur when the worker's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment.

1.16 If the medical assessor considers that the claimant's treatment has been inadequate and maximum medical improvement has not been achieved, the assessment should be deferred and comment made on the value of additional or different treatment and /or rehabilitation – subject to paragraph 1.34 in the Guidelines.

The ALA does not understand the rationale for requiring an impairment assessment prior to permitting reasonably necessary medical treatment. The ALA relies on the principles of assessment in AMA5¹⁰ to assert that impairment should not be used to determine the duration of treatment. ALA members have experienced a myriad of deteriorating conditions in respect of which workers defer treatment (knees, backs, necks, shoulders) until absolutely necessary or conditions in respect of which the accepted professional protocol is to defer treatment or surgery until much later in life.

⁸ *Vella v Penrith City Council WCC 7642 of 2013*

⁹ *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet [2015] NSWCCPD 14*

¹⁰ American Medical Association Guides to the Evaluation of Impairment 5th Edition

There is the added complication of the process of asserting the degree of impairment particularly in light of the limitations in section 322A of the 1998 Act to one Medical Assessment Certificate and one medical assessment. How can a worker access medical expenses compensation to which they may legitimately be entitled but for the fact they have had their permanent impairment assessed previously?

The ALA believes that the secondary surgery exemption in section 59A(7) does not adequately address the problems created by section 59A.

The 2015 amendments did not address the anomalous requirement of section 59A that treatment be provided or given within the requisite period.

The ALA supports the statement of principles in the Parkes Project regarding medical expenses and the proposed recommendations in relation to amendment of the legislation particularly in relation to section 59A.

The ALA seeks a recommendation that section 59A be amended to remove impairment as a determinant for medical treatment in the workers compensation scheme in New South Wales.

Section 59A of the 1987 Act and perverse outcomes

A farcical situation has arisen whereby workers and insurers get stuck in a circular argument about treatment. Take, for example, a worker who requires surgery, for example a spinal fusion: the insurer denies liability for that surgery because their impairment is less than 11% and more than 2 years have passed since the cessation of their weekly payments. However, had the worker had that surgery their impairment would be assessed as greater than 20% which would entitle the worker to the treatment for life.

Furthermore, the worker may have had their one impairment medical assessment. Are they not prevented from seeking a further assessment to access their medical benefits?

The result is that, in order to access medical treatment given the complexities created by s 59A, workers are undertaking surgery sooner than required to avoid bearing the costs themselves or alternatively are forced to remain on weekly benefits as long as they can (preferably with no capacity to work) to ensure their medical treatment is afforded to them when needed. This has the unintended consequence of delaying return to work.

The ALA submits that section 59A gives rise to a great number of complex and uncertain outcomes, and that it requires redrafting or repeal to allow appropriate access to medical treatment by workers. The provision of adequate medical treatment to injured workers is vital to early return to work outcomes.

Section 60(2A) of the 1987 Act

Section 60(2A) was introduced in the 2012 amendments to provide further restrictions to workers seeking reimbursement for medical expenses. Put simply, the section requires a worker to seek reimbursement of medical expense prior to the insurer becoming liable for the costs the treatment. The regulations provide exceptions to the requirement for the pre-approval in limited circumstances.

The section has regularly thrown up examples of particular unfairness that are worthy of recount.

A prime example is the matter of *Chris Waller Racing Pty Ltd v Muscutt* (WCC 788 – 2016) which is currently before the Presidential Unit of the Workers Compensation Commission.

Mr Muscutt suffered injury to his low back when ducking under a rail while encumbered by a bundle of papers in the course of his employment on 13 January 2015. He took analgesics and attempted to continue working but his pain, including radicular symptoms, gradually increased. On 19 January 2015 (6 days after injury) his partner took him to the Emergency Department of Norwest Private Hospital where he came under the care of respected neurosurgeon, Dr Brian Oowler. Dr Oowler recommended microdiscectomy and rhizolysis. Dr Oowler considered it appropriate, if not imperative, to undertake the surgery on an urgent basis. On 20 January 2015 Mr Muscutt was contacted by Dr Oowler's rooms and informed that the surgery would take place on the following day, 21 January 2015.

The insurer accepts that the treatment was reasonably necessary but has declined to pay the costs of the surgery on the basis that the surgery falls outside the exceptions and Mr Muscutt did not obtain pre-approval.

Mr Muscutt will be left with a greater than 10% impairment. He would likely have at least 5 years of medical treatment afforded to him. Yet, because he did not seek pre-approval he may not be entitled to have the essential, and costly, surgery paid for.

In the 2014 Review of the Functions of WorkCover section 60(2A) was canvassed and discussed. Recommendation 7 of Report 54 provides "*that the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.*" The ALA calls for implementation of that recommendation and abolition of section 60(2A).

The ALA submits that the Act should provide that if the treatment requested is reasonably necessary (s 60) and *requested* within the relevant section 59A period then the insurer should be required to reimburse the cost of that treatment regardless of when the treatment is undertaken and regardless of whether pre-approval is sought.

Section 38 of the 1987 Act – post second entitlement weekly payments

Section 38 of the 1987 Act provides for a worker to receive weekly payments after 130 weeks of payments if they meet certain preconditions. Access to weekly payments after 130 weeks is restricted by the insurer having sole determination as to a worker's work capacity.

There is a second barrier to accessing weekly payments: if a worker has some work capacity, the insurer is to assess the worker's capacity to undertake further additional employment or work that would increase the worker's current weekly earnings. This is quite apart from the fact that the worker is already required to have returned to work for a period of not less than 15 hours per week (and be earning a minimum weekly wage).

These insurer determinations which constitute work capacity decisions, and therefore are subject to the review process rather than consideration by a tribunal, are a barrier to accessing benefits ostensibly made available under the 1987 Act.

The ALA calls for amendment of section 38 to remove the subjective insurer determinations required for payment of weekly benefits.

Section 32A of the 1987 Act - work capacity and the definition of suitable employment

The definition of "current work capacity" in section 32A of the 1987 Act is:

***Current work capacity** in relation to a worker means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in **suitable employment**.*

The definition of "suitable employment" contains the very harsh limb (b) which permits an insurer to consider employment as suitable regardless of whether the work is available, is of a type or nature that is generally available in the employment market, is in the nature of the worker's preinjury employment and regardless of the worker's place of residence.

The insurer makes the decision as to the whether the worker can work, whether the worker is undertaking sufficient work to the satisfaction of the insurer, what work the worker could undertake (regardless of whether that work actually exists), what the worker could earn in that notional employment and how much in weekly payments the worker will receive. The arbitrariness, subjectivity, inherent inequity and unfairness of these decisions does not need further amplification.

The ALA echoes the concerns of the legal profession expressed in the submissions of the Law Society of NSW and the NSW Bar Association. The ALA has called for abolition of limb (b) of the definition of suitable employment since the 2012 reforms and maintains the call for a test of actual, and not theoretical, employment as contained in the draft recommendations to the Parkes Project.

Section 38A of the 1987 Act – minimum weekly payment for workers with highest needs

The 2015 Amendments introduced section 38A to the 1987 Act. That section provides for a minimum safety net of weekly payments for workers with highest needs (workers with greater than 30%WPI). It was a welcome addition to the Act and the Government should be commended for its introduction.

Unfortunately, the transitional regulations have been interpreted by the Workers Compensation Commission in a way that the safety net does not apply to those seriously injured workers (now workers with highest needs) who were "existing recipients". This would comprise about 950 of the most seriously injured people in the scheme. The ALA sees no policy reason as to why some workers with highest needs should be excluded from the benefit purely based upon whether they were receiving weekly benefit on 1 October 2012 or not. Such a distinction is arbitrary and unfair.

The ALA submits that the extension of the safety net should cover all workers with highest needs.

Sections 44C – 44I of the 1987 Act - the definition of 'pre-injury average weekly earnings' (PIAWE)

The calculation of pre-injury average weekly earnings (PIAWE) can result in a worker receiving less than their full entitlement to weekly payments. The barrier is found in the definition of PIAWE.

There has been much discussion concerning the 'definition' of pre-injury average weekly earnings (PIAWE). In February 2016 SIRA undertook a 'consultation' on the regulation of PIAWE.

The ALA commends to the Committee the submissions made by the Law Society of New South Wales, ALA, CFMEU and icare to that consultation process (available at <http://www.workcover.nsw.gov.au/about-us/have-your-say/regulation-of-pre-injury-average-weekly-earnings-piawe/regulation-of-pre-injury-average-weekly-earnings-submissions>).

SIRA has recently appointed an external consultant to conduct further consultation in relation to the regulation of PIAWE.

It is the view of the ALA that the legislation requires amendment rather than change effected by regulation.

The ALA submits that the computation method (or definition) of PIAWE should be simplified and that the determination of PIAWE should be removed from the definition of a work capacity decision.

Costs

The ALA has had the benefit of reading the submission of the Law Society of New South Wales. The ALA agrees with and supports the submission made by the Law Society in relation to legal costs.

In the interests of the injured worker the ALA wishes to emphasise the importance of adequate legal representation. The workers compensation system, like any compensation model, requires a robust dispute resolution system to both ensure that those who are entitled to compensation have access to it and those who are not entitled do not. Injured workers who are deserving of compensation should be able to achieve a quick and timely resolution to their dispute with the insurer.

The ALA is concerned that if the difficulties raised by the Law Society are not addressed that the quality and availability of legal representation may diminish and as a consequence workers will abandon their entitlements potentially pushing them onto social security and other community support measures.

Return to work outcomes

It bears stating that a key objective of the workplace injury management and workers compensation system is *"to provide prompt treatment of injuries, effective and proactive management of injuries and necessary medical and vocational rehabilitation*

following injuries in order to assist injured workers and to promote their return to work as soon as possible" ¹¹.

In the 2014 In the recent Budget Estimates hearings the Minister for Innovation and Better Regulation said: "*In terms of the scheme redesign, we have got better return-to-work figures. That on any measure is a positive outcome; that is a concrete realisation as a result of reform. More people are returning to work, and that ultimately has to be the fundamental premise and driver of the workers compensation scheme—to get people back on their feet and provide compensation in the event that they cannot work.*" ¹²

The ALA cannot find any direct correlation between the statistical information and the Government's assertion. The statistical bulletin of 2012/2013 does not report on return to work outcomes or provide 'figures' for 'return to work'. The most recent statistical bulletin relates to the 2013/2014 financial year¹³ and does not provide any figures related to return to work. There is no consistent or reliable measure of return to work outcomes. The ALA is of the opinion that indirect outcome measures are used as a proxy for return to work outcomes, such as claims closures or claims inactivity.

The most recent national workers compensation scheme performance statistics have been extrapolated by Safework Australia for its "*Comparative Performance Monitoring 2013-2014*" report. At page 33 of that report there is a state by state comparison of return to work outcomes for the years 2009/2010 to 2013/2014. The NSW results show a minor reduction in return to work rates from 2011 to 2014 despite an increase of two percentage points in 2013 shortly after the 2012 reforms were introduced.

The Committee is reminded of the second reading speech of (then) Minister Baird for the *Workers Compensation Legislation Amendment Bill 2012* and the *Safety, Return To Work And Support Board Bill 2012*:

*"The Workers Compensation Legislation Amendment Bill represents a fundamental shift towards properly meeting the needs of the most seriously injured workers in the scheme **while strongly incentivising return to work for those workers who have the capacity to return to work...**". [our emphasis]*

The ALA submits that the weekly compensation regime was designed to encourage return to work by paying short term weekly benefits at less than 100% income replacement for a period of 13 weeks with substantial step downs at weeks 14, 53, 131 and week 260, the reality is that very few workers can access benefits after week 130 unless they have a severe (more than 'serious'; almost catastrophic) injury and therefore either must return to the workforce or apply for social security payments.

The system, as it has become, does not provide an integrated experience for a worker whereby a worker is supported by weekly income replacement, a sympathetic employer, a treatment and care program that sees them supported in the workplace as

¹¹ Section 3 *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)

¹² General Purpose Standing Committee No. 6 Thursday 1 September 2016. Examination of the proposed expenditure for the portfolio area Innovation and Better Regulation, The Hon. Victor Dominello, Minister for Innovation and Better Regulation, Page 16

¹³ Statistical Bulletin 2013/2014 NSW Workers compensation statistics, SIRA and SAFEWORK.

they recover from injury. Rather, the system is adversarial in nature with disputation encouraged at very early stages of a claims process merely by a disagreement over the calculation of average weekly earnings, or by an insurer's refusal to respond to a request for pre-approval of a treatment. This, of course, means that return to work outcomes are not front of mind for insurers or workers. Anecdotally we understand that there are perverse incentives for claims officers to dispute claims rather than accept them, pay benefits and steer the worker back to work.

What is missing to support the objectives of better return to work outcomes is attention to return to work 'incentives' (for employers), rehabilitation, vocational retraining and scheme design based on a reducing the 'bio-psycho-social' factors that affect a worker and prevent early and durable return to work.

The recent gazettal of the return to work 'incentives' provisions, sections 64B and 64C, does not in the ALA's opinion alleviate the need for better and more focussed legislative amendment. Section 64B provides a one off payment to a worker who is unable to return to work with his or her pre-injury employer and who accepts an offer of employment with a new employer. Section 64C is predicated on the worker having a greater than 20% WPI and having received weekly payments for an aggregate period of greater than 78 weeks in which case compensation for the cost of education or training up to the value of \$8,000 is to be provided to assist the worker to return to work. With respect to the legislators and the regulator these payments are insufficient as incentive to encourage early return to work or to an employer to provide suitable employment for their worker. Any worker who makes a claim for the incentive is more or less inviting the insurer to make a work capacity decision thus potentially disintitling themselves to ongoing weekly payments.

The ALA notes recommendation 11 of report 54 from the former Committee and calls for the introduction of further incentives to encourage compliance by employers to provide suitable employment for their injured employees and further disincentives to encourage employers to facilitate early and sustainable return to work for injured employees.

AFFORDABILITY AND BENEFITS

The ALA has had the opportunity to read the submission of the Law Society and the documents provided by icare in relation to actuarial valuations of the nominal insurers.

The ALA has also considered the 2014/2015 WorkCover Annual report and evidence given in the recent Budget Estimates hearings by Minister Perrottet regarding the current financial status of the scheme.

The ALA submits that the scheme is in healthy surplus: there is at least \$1.4B in excess of funds required to maintain a 110% funding ratio. In the four years since 2012 the scheme has gone from extreme deficit to extreme surplus. This has come at the expense of benefits to workers.

The ALA understands that Minister Dominello in recent Budget estimates when questioned about the surplus gave the following response:

"I will be asking the State Insurance Regulatory Authority [SIRA] to look at what the final year figure is and to provide some recommendations to me, and

*therefore the Government, in relation to premium and benefit settings and whether there is any flexibility, given whatever the surplus is."*¹⁴

The ALA submits that in relation to that 'flexibility', the Government address the access issues highlighted in this submission to ensure workers can appropriately and easily access the benefits within the scheme.

In addition, the ALA submits that the following benefits improvements are warranted:

1. Overall improvement to the weekly benefits entitlement periods by:
 - a) increase to weekly payments during the first 13 weeks to 100% of AWE;
 - b) removal of the 52-week step down in the calculation of PIAWE;
 - c) penalties to employers where placement in suitable employment is refused;
 - d) removal of the unreviewable subjective discretion of an insurer to determine capacity in ss38 (2) and (3) of the 1987 Act;
 - e) recasting the suitable employment test to reflect actual labour markets;
 - f) remove all limitations on duration of weekly payments for seriously injured workers except for the Commonwealth retirement age.
2. Improvement to the permanent impairment provisions by:
 - a) permit negotiation between impairment assessments to facilitate quick and easy resolution of these dispute;
 - b) permitting workers to bring second and subsequent claims for permanent impairment compensation where there is a deterioration in their condition leading to an increase in the degree of impairment by at least 5%;
 - c) removal of section 322A of the 1998 Act to permit more than one medical assessment certificate and more than one assessment of permanent impairment;
 - d) permit aggregation of impairments from separate injurious events for the purpose of eligibility to be treated as a worker with highest needs;
 - e) strengthen benefits for seriously injured workers, by lowering the threshold for workers with highest needs to 20%;
 - f) lowering of the threshold to access lump sum compensation to 'greater than 5%'
 - g) increasing the benefits scale to implement recommendation 11 of the Joint Select Committee (June 2012) to reflect the non-economic loss scale in the other personal injury jurisdictions in NSW.
3. Restoration of medical and treatment expenses (including amendment or repeal of sections 59A and 60(2A) of the 1987 Act to all workers for life.

¹⁴ Budget Estimates hearings, Uncorrected Transcript Minister Dominello, Thursday 1 September 2016 Legislative Council.

4. Inclusion of funds management compensation for beneficiaries of death benefits under section 25.

CONSULTATION

The ALA acknowledges that a particular focus of the 2014 review of the workers compensation scheme was engagement by the regulator (WorkCover) in consultation with the legal profession.

The legal and insurance reference group, formed after the 2012 scheme changes, last met in February 2015. In June 2015 the ALA participated in a consultation process convened by Newgate Consulting on behalf of WorkCover to develop a new consultation model for the regulator. The ALA is not aware of the outcome of that consultation process.

Since 2016 the ALA has been invited to engage in quarterly consultation with the Executive Director of SIRA and with various other officeholders. The ALA has submitted agendas for meetings and raised issues on a regular basis with SIRA.

SIRA has adopted a method of consultation on issues via discussion paper published on their "Have Your Say" webpage.

The ALA has provided detailed submissions to the consultation on the remake of the 2016 Workers Compensation Regulation, review of the Workers Compensation Claims Guidelines, regulation of pre-injury average weekly earnings (PIAWE), and regulation of legal costs for work capacity decision reviews. Not all of the submissions are published or available to the public through the website. This lack of transparency is frustrating.

The ALA is a not-for-profit organisation made up of volunteers who for the most part also maintain full-time employment. There has been a steady flow of discussion papers from SIRA since October 2015. The ALA has found that the preparation of lengthy submissions onerous, more so because the process is not a two-way exchange and feedback is rarely forthcoming.

The ALA would prefer a properly constituted legal profession and stakeholder reference group or committee with regular meetings thereby mitigating the need for detailed responses from stakeholders to matters under review by the regulator. In addition, the ALA sees the need to maintain open and direct access to SIRA in relation to emerging issues with the scheme and an opportunity to express its views with an understanding that those views will be taken into consideration.

CONCLUSION

The ALA thanks the Standing Committee on Law and Justice Committee for the opportunity to provide this detailed and lengthy submission to its first review of the workers compensation scheme.

The ALA welcomes the opportunity to provide oral testimony in relation to any of the matters raised by this submission or matters of interest to the Committee.

PARKES PROJECT ADVISORY COMMITTEE

DRAFT RECOMMENDATIONS

SETTLEMENT AND FINALISATION OF CLAIMS

Principles adopted

1. Workers should be entitled to exit the Scheme on a fair and reasonable basis with minimal constraints.
2. Negotiation between degrees of impairment should be permitted.

Recommendations

1. Permit all injured workers to exit the scheme by choosing a lump sum in place of periodic or other payments (subject to the appropriate approval process).
2. Parties to a permanent impairment claim should be able to negotiate the degree of Whole Person Impairment for the purpose of determining the quantum of permanent impairment compensation (note protections in section 66A(3))
3. Repeal the commutation provisions in the 1987 Act (sections 87E – 87K)

WEEKLY PAYMENTS

Principles adopted

1. The calculation of Pre Injury Average Weekly earnings should be a **simple and fair process**
2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged)
3. 'PIAWE' should reflect the **current value** of 'pre-injury average weekly earnings' (Indexation) as should the Maximum cap on weekly payments.
4. Where there has been an inadequate payment of weekly payments, adjustments should be easily arrived at and paid from the date of the claim/notification
5. An injured worker should not be penalised because of their continued lack of any capacity (total incapacity) for work.
6. The suitable employment test has resulted in unfairness in the measure of benefits/earnings for certain categories of injured workers.

Recommendations

Pre Injury Average Weekly Earnings

1. Simplify the definition and computation method of **pre-injury average weekly earnings**. As a guide, some of the features the former section 43 (Computation of Average Weekly Earnings) be retained including providing for the employer to provide to the worker such details of the earnings of the worker as will enable the worker to determine his or her pre-injury average weekly earnings.

2. Provide for a “default” (or “interim”) rate of weekly payments where calculation of PIAWE can not be accurately completed to enable weekly payments to commence within 7 days of injury
3. Amend Section 82A to ensure indexation of PIAWE in all circumstances.
4. Clarify the meaning of a “week” in the context of calculating PIAWE.
5. Provide for adjustment and backdating of adjustments of PIAWE to encourage early and prompt payments and avoid unnecessary time consuming disputation. Considerations:
 - Exclude PIAWE calculated in the provisional liability period from the definition of ‘Work Capacity Decision’ and/or
 - Mandate the provision of the employer’s completed PIAWE form and exchange of information required to calculate PIAWE between the parties as part of the ‘revision’ process and/or
 - Permit backdating of adjustments to PIAWE to the date of injury with force and effect from that date.
6. Amend Schedule 3 in relation to ‘Workers employed by 2 or more employers’ (Items 2, 3, 4, 5, 6, and 8) so as not to penalise such workers in the calculation of PIAWE and therefore weekly payments.

Weekly payments of compensation

7. Clarify the meaning of a “week” in the context of determining weekly payments entitlements.
8. Amend the definition of ‘suitable employment’ in section 32A to reflect an actual and not a theoretical test.
9. Amend section 38(2) and (3)(c) to remove the discretion of the insurer (“*the worker is assessed by the insurer as having no current work capacity and is likely to continue indefinitely to have no current work capacity*”, “*the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings*”).
10. Amend Section 41 to provide for continuing weekly payments during a period of reduced work capacity post second surgery until the worker resumes or improves their pre-surgery work capacity.
11. Amend section 52 to ensure that injured workers have as a minimum an entitlement to 12 months of weekly payments regardless of the date of their injury.
12. Amend section 54 to provide an exclusion to the 3 month notice period where a worker who has current work capacity and who has employment commences to earn sufficient wages such that their continuing weekly payment is reduced to \$0.
13. Remove clause 21 of Schedule 8 of the Workers Compensation Regulation 2010 (which provides that three months notice must be given to a worker before increasing the amount of compensation payable to them).

Generally

14. Increase weekly payments in the first entitlement period to 100% of pre-injury average weekly earnings.
15. Provide a simplified and enhanced weekly payments regime for seriously injured workers with removal of subjective tests of capacity based on 100% of pre-injury average weekly earnings.
16. Remove the 52 week step down which occurs as a consequence of removal from the PIAWE calculation of overtime and shift allowances.

17. Remove impairment evaluation as a measure for access to incapacity payments, alternatively have one threshold for continuation of payments beyond 5 years (20%).

MEDICAL EXPENSES

Principles adopted

1. Prompt and early medical treatment underscores and supports early and successful return to health and work.
 2. Access to medical treatment and services should not depend on impairment evaluation.
 3. A medical expenses claims process including pre-approval processes must be prescribed and be simple.
 4. Delays in treatment can lead to undesirable outcomes.
 5. The 12 month cap on medical expenses should run from when weekly payments are last made and should capture all claims for medical treatment expenses **made** within that 12 months (currently, must have *received the treatment within the 12 months*).
 6. For medical treatments or services, recognition should be given to the best practice scheduling of such treatments and standard treatment plans. (*Effect should be given to section 60(2C)(d) of the 1987 Act*).
 7. There should be a general exception to the cap on duration of medical treatment to cover:
 - a. Reasonably necessary surgery
 - b. Treatment required to ensure the worker *remains at work* or is capable of returning to work
 - c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate
- **Minority Position:** the 12 month cap should be removed for all injured workers.

Recommendations

Section 59A

1. Extend the operation of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* [especially Schedule 8, Part 2, R 28(1)] to all claims by amendment of the legislation (currently applies to existing claims only: cf definition of existing claims in 1998 Act).
2. Extend the exemption provided in the Existing Claims Regulation for 'life'.
3. Clarify 'claim for compensation' or prescribe that time runs from the date the first claim for medical expenses or treatment is made.
4. Replace the requirement that the treatment be provided or given within the 12 months period with a requirement that the 'claim for medical expenses compensation to be made within the 12 months' - as an example :

*Section 59A(1) "Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance **for which a claim is made** more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker."*

5. Amend section 59A(2) to clarify from when the 12 months commences:

*Section 59A(2) "If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance **for which a claim is made** more than 12 months after the worker **last** ceased to be entitled to weekly payments of compensation."*
6. Delete the words "*but only in respect of treatment... weekly payments are payable to the worker*" from section 59A(3).
7. There should be a general exception to the cap on duration of medical treatment to cover:
 - a. Reasonably necessary surgery
 - b. Treatment required to ensure the worker *remains at work* or is *capable of returning to work*
 - c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate
8. Consider a 6 year ultimate cap on medical and treatment expenses (seriously injured workers and those with an impairment of greater than 20% excluded).

Pre-approval of medical treatment

9. Provide a defined and easier path for pre-approval of specific treatments and courses of treatment including post operative treatment plans in accordance with clinical practice thereby avoiding unnecessary and repeated requests for pre-approval
10. Add to the exemptions to pre-approval those services provided on emergency admissions to hospital (outside the first 48 hours after injury)

Generally

11. For the purpose of exempting those with an impairment of greater than 20% and seriously injured workers from the 12 months cap:
 - a. Provide an eligibility test permitting impairments from all injuries to be aggregated
 - b. Provide that a worker who meets the eligibility test not impact premiums
 - c. Provide that the Nominal Insurer meet the medical and treatment expenses
12. Medical treatment and service providers should be clearly informed of the duration cap (expiry date for payment of medical treatment in advance and the grounds, if any for provision of services beyond that date).
13. Amend Section 60(5) to make the referral to medical assessment discretionary rather than mandatory
14. Consider reformulation of policy in relation to the payment of medical and treatment expenses for injured workers particularly the 12 months cap and the reliance on impairment evaluation to determine access to benefits..

PERMANENT IMPAIRMENT

Principles adopted

1. Workers should receive fair compensation for the permanent impairment which arises as a consequence of a work related injury.
2. Workers whose impairment significantly increases as an unintended consequence of reasonably necessary surgery or deterioration of the underlying injury/condition should be

compensated for the consequent 'permanent impairment'.

3. There should be an exception to the one claim policy if it is established that an agreed degree of impairment is manifestly too low or there has been a significant increase in the degree of impairment.
4. The impairment assessment methodology and quantification of compensation should be the same regardless of when the injury occurred.
5. In a scheme where impairment thresholds determine access to various levels and types of benefit there must be exceptions to the 'one assessment' principle.
6. **Minority Position:**
 - a. Workers should be able to access compensation for pain and suffering in addition to permanent impairment;
 - b. There should be no threshold for permanent impairment compensation;
 - c. there should be no restriction on claims for permanent impairment compensation (repeal section 66(1A) of the 1987 Act).
7. **Further Minority Position:**
 - a. Reduce threshold in section 66(1) of the 1987 Act to 5%
 - b. As an alternative to 6 a. above, incorporate the former pain and suffering compensation (section 67) into the compensation available for permanent impairment.

Recommendations

1. Provide exceptions to the 'one claim policy' to permit workers to bring second and subsequent claims for permanent impairment compensation for deterioration in their condition which results in a significant increase in impairment.
2. Remove section 322A (one assessment of permanent Impairment) from the 1998 Act.

SERIOUSLY INJURED WORKERS

Principles adopted

1. There should be a separate assessment for determining whether a worker is seriously injured which is for the purpose of determining entitlement to weekly payments and medical treatment.
2. All of a worker's injuries and impairments should be considered for the purpose of satisfying a seriously injured worker threshold test, so long as there are compensable rights attached to each injury and impairment evaluation.
3. Determination of the apportionment of liability between insurers to the benefits payable to a seriously injured worker should be prescribed in the legislation.
4. A seriously injured worker who has no prospect of returning to work should be exempt from monthly medical assessments and regular certification of capacity where appropriate clinically.

Recommendations

1. Provide a separate assessment test (if section 322A not repealed) for determining threshold issues.
2. Specifically permit aggregation of impairments arising from separate and distinct (work related) injuries for which there are ongoing compensable rights for the purpose of the seriously injured worker threshold and ensure section 22 (apportionment of liability) adequately provides for consequent apportionment of liability in respect of each injury.
3. Reduce the seriously injured worker threshold to 'greater than' 20% WPI.
4. Remove the theoretical test of suitable employment where it is to be applied in respect of a seriously injured worker. (eg section 38 1987 Act, Section 49 1998 Act)

DISPUTE RESOLUTION SYSTEMS

Principles Adopted

1. There should be one Dispute Resolution System which works within the legislation.
2. There should be one form of dispute notification.
3. Minor disputes or issues should be capable of resolution in a timely manner without the formality required for more complex issues.

Recommendations

1. Remove the multiple review processes for Work Capacity Decisions
2. Replace the multiple dispute resolution paths with a single dispute resolution process/system in a single tribunal (the Workers Compensation Commission) with an appeal path.
3. Continue and refine in the Workers Compensation Commission a more simplified expedited claims resolution pathway for 'minor' or urgent disputes.
4. Permit workers and 'insurers' to engage legal advice in respect of a workers compensation issue. Provide for workers' legal costs to be met through ILARS.

COSTS AND LEGAL REPRESENTATION

Principles adopted

1. Workers and insurers should be able to obtain legal **advice** and representation with respect to all disputes (including WCDs)
2. Costs should reflect proper remuneration for all lawyers for both workers and insurers.
3. Part 16 "Marketing of Work Injury Legal Services and Agent Services" of the *Workers Compensation Regulation 2010* and Division 8 of Part 2 of Chapter 4 "Prohibited Conduct Related to Touting for Claims" of the *Workplace Injury Management and Workers Compensation Act 1998* should be deleted as this will be the subject of the *Legal Profession Uniform Law Application Legislation Amendment Bill 2015* introduced into NSW Parliament on 27 May 2015.

Recommendations

1. Remove section 44(6) of the 1987 Act

2. Remove clause 9 of Schedule 8 of the Workers Compensation Regulation 2010
3. Establish a proper costs regime for legal representatives for workers and employers/insurers

RETURN TO WORK OBLIGATIONS AND SUITABLE EMPLOYMENT

Principles adopted

1. Supported early return to work after injury is fundamental to the system and the scheme.
2. The test for suitable employment should be an actual test not a theoretical test
3. Disputes about provision of suitable employment or return to work should be simply and quickly managed.
4. Incentives should be provided to employers to provide suitable employment to injured workers and to workers to return to work after injury.
5. Rehabilitation following work injury should be meaningful and provided in a timely manner.

Recommendations

1. Replace the Suitable employment test in section 32A with an actual test for the purpose of facilitating quick safe and durable return to work
2. Provide an appropriate dispute resolution pathway (within the Workers Compensation Commission) to manage disputes concerning 'Chapter 3 Obligations' with power to make prompt determinations.
3. Workers who seek and are not provided with suitable employment by their employer should be entitled to receive an extension of their weekly payments until suitable duties are provided or they have received five years of weekly compensation.

JOINT TORTFEASORS AND SECTION 151Z

Principles adopted

1. Workers should not be penalised in a joint third party tortfeasor action where they are unable to recover work injury damages from the employer
2. The insurer should be able to recover additional compensation paid to or on behalf of a worker as a consequence of a subsequent negligent act of a third party (not the employer)
3. Third Party tortfeasors should be able to be compelled to attend Mediation in Work Injury Damages claims.

Recommendations

1. To resolve the unfair erosion of damages through operation of section 151Z(2) where the employer *is negligent* but there is *no claim* capable of being maintained due to threshold issues, the Section 151H threshold should be ignored for the purpose of calculating any s 151Z(2) reduction. A suggested amendment to the section is:

151Z(2)(f) *"In reducing damages in accordance with sub-section (c) above, the injured worker is deemed to be above the threshold referred to in Section 151H".*

2. Amend Section 151Z to specify that sub-section (2) does not apply to extreme injury where the total damages recoverable by the worker from a person other than their employer exceeds one million dollars. An appropriate amendment is:

151Z(2A)(a) sub-section (2)(c) does not apply to the damages recoverable in the case of extreme injury.

(b) For the purpose of this sub-section a case of extreme injury is one where the total damages recoverable from a person other than the worker's employer: exceeds one million dollars.
3. Add a further paragraph to sub section 151Z(2)(e) as follows:

In any event, the repayment referred to in ss.(1)(b) and the indemnity referred to in ss.(1)(d) is for the amount of any weekly payments of compensation already paid in respect of the injury concerned only.
4. Add to Section 151Z(2) a further paragraph:

For the purpose of ss.(2)(d) damages shall be taken to include any compensation already paid under Division 3 and Division 4 of Part 3.
5. Provide for mandatory attendance of any third party tortfeasor at a Mediation between Worker and employer in a Work Injury Damages Claim.

ACCESS TO INFORMATION BY A WORKER

Principles adopted

1. There should be transparency about information collected by an employer or insurer about an individual injured worker.
2. A worker should be provided by the employer or insurer with information of the kind referred to in clause 46 of the WCR 2010 with the general exception that if the supply of that information would pose a serious threat to the life or health of the worker or any other person, the information, in the case of medical information, must be provided to a medical practitioner, or in other case, to a legal practitioner.

Recommendations

1. Mandate provision to a worker or person nominated by the worker (such as a legal practitioner or union or doctor), upon request, of all documents relating to the worker's claim and return to work *prior to* or *regardless of* the issue of a dispute notice. [Amend the Workers Compensation Regulation 2010 and the Claims Guidelines and the Claims Manual to reflect a worker's entitlement to request and receive all information pertaining to the worker (other than information which is subject to legal professional privilege or other privilege)]

DEFINITIONS

Principles adopted

1. There should be consistency of language, terminology and drafting throughout the legislation.
2. The legislation should be clear on its face as to its meaning and intention.
3. The structure of the Act(s) should reflect the practical operation of the Scheme.
4. Where possible there should be national consistency or harmony of definitions used in workers compensation legislation.

Recommendations

1. Consolidate terms and expressions used in the legislation to ensure consistency. For example “more than” and “greater than”.
2. Redraft existing provisions of the Acts to provide clarity and where possible, incorporate nationally consistent language.
3. Amalgamate the two Acts into one with the purpose of ensuring that the Act sets out the rules that govern the Scheme in a way that is comprehensive, coherent and readily understood by Scheme participants.

INDEPENDENT MEDICAL EXAMINERS / EXAMINATIONS (IME’S)

Principles adopted

1. Where possible only one IME should be requested by a worker and an employer/insurer in relation to a medical issue with respect to a worker unless there are comorbid conditions.
2. Independent Medical Examiners (IMEs) should have qualifications, training and clinical experience commensurate with the body part/injury they are required to assess.
3. There should be better regulation of the use of IMEs in all circumstances (see section 119 WIM Act)
4. The Guideline on Independent Medical Examination requires updating through stakeholder consultation to achieve relevance in the current scheme design.

Recommendations

1. Consider implementing a system whereby the injured worker is referred to one IME relevant to the body system/part injured who will report to both the worker and the insurer. That report should be accepted unless there is an exceptional reason for the worker to be referred to an Approved Medical Specialist (AMS).
2. Introduce a mechanism by which Independent Medical Examiners are accountable for their opinions.
3. Change the rules around the use of IMEs to accommodate the single IME system.

Section 74 Notices and Work Capacity Decisions

Instructions:

a. New decisions – section 74 notices

Scheme agents may only issue a notice of decision in accordance with section 74 of the 1998 Act and the Guidelines for Claiming Workers Compensation to stop weekly payments after they have started in the circumstances set out in Table A.

Table A

Reason to dispute liability	Reference
The person is not a worker and as a result there is no compensable total or partial incapacity for work	Section 4 and 5, and Schedule 1, of the 1998 Act
The worker's total or partial incapacity for work is not a result of a work injury	Section 4 of the 1998 Act Section 33 of the 1987 Act
The worker's total or partial incapacity for work results from an injury on a journey with no real and substantial connection between their employment and the accident that caused the injury	Section 10 of the 1987 Act Section 33 of the 1987 Act
The worker's total or partial incapacity for work results from a psychological injury that was wholly or predominantly caused by the employer's reasonable action	Section 11A of the 1987 Act Section 33 of the 1987 Act
The worker has fully recovered from the effects of their accepted work injury and as a result there is no total or partial incapacity for work	Section 33 of the 1987 Act

Examples include:

- medical evidence demonstrates the worker is able to return to pre-injury employment (that is, the worker does not have a total or partial incapacity for work)
- medical evidence demonstrates any incapacity for work is attributable to some other cause, for example, the worker injures his or her knee at work, and later, while playing with his or her children, injures his or her back, and the medical evidence demonstrates that any incapacity for work arises from the injury to the worker's back

Decisions to stop weekly payments after they have started in the circumstances set out in Table A assess the cause and not the extent of the worker's incapacity to work.

b. New decisions – work capacity decisions

The decisions outlined in Table B are work capacity decisions.

Notice of a decision to stop a worker's weekly payments where that decision is made consequent on a decision referred to in Table B must be given by a Scheme agent in accordance with the Guidelines for Claiming Workers Compensation (Reference – Part B 1.3 Guidelines for Claiming Compensation). Any work capacity decision may be the subject of review pursuant to section 44BB of the 1987 Act (Reference – Part B 1.4 Guidelines for Claiming Compensation).

Table B

Work Capacity Decision	Reference
The worker's current work capacity	Section 43(1)(a) of the 1987 Act
What is suitable employment for the worker	Section 43(1)(b) of the 1987 Act
How much the worker can earn in suitable employment	Section 43(1)(c) of the 1987 Act
The worker's pre-injury average weekly earnings (PIAWE) or current weekly earnings	Section 43(1)(d) of the 1987 Act
Whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment	Section 43(1)(e) of the 1987 Act
Any other decision of the Scheme agent that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in this table.	Section 43(1)(f) of the 1987 Act

Examples include:

- a worker has not returned to work, but medical and vocational evidence obtained by a case manager confirms that the worker is able to return to work in suitable employment
- a worker has returned to work with a new employer and the case manager obtains evidence indicating the new role constitutes suitable employment and that the amount the worker is now able to earn in this suitable employment has increased

Scheme agents must not issue a section 74 notice when a worker's entitlement to ongoing weekly payments changes as a result of a decision about one of the matters set out in Table B.

Scheme agents must not issue a work capacity decision referencing section 33 of the 1987 Act or any other of the primary entitlement provisions outlined in Table A.

c. Existing decisions

Where a previous Section 74 or work capacity decision has been issued in accordance with the guidance material provided to Scheme agents on 12 February and 28 June 2016, Scheme agents are to report any internal review requests received or any other relevant litigation commenced on these claims to icare via workcapacity@icare.nsw.gov.au, cc'ing in the SLM@icare.nsw.gov.au inbox so the appropriate action can be determined.

Scheme agents are also reminded that they are not to withdraw a previously issued work capacity decision.